Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1627

JAMES L. GREEN,

Petitioner,

vs.

COUNTY OF ALAMEDA,
DOUGLAS HICKLING, COUNTY COUNSEL OF
THE COUNTY OF ALAMEDA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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TO THE JUSTICES OF
THE UNITED STATES SUPREME COURT:

In the past several years the courts have written a number of decisions strengthening the Constitutional rights of the citizen in the working place. These decisions have been made without evidence of region or limited to any specific locale. The decisions reflect a growing conciousness that every citizen has the right to be a productive member of his society, and that this right cannot be taken away by whim or by capricious action. There is, of course, sound reasoning in any free society for rejecting the notion that a citizen can be deprived of his income, by the government, for his political beliefs or actions—as specifically occurred here—lest we re-live the nightmare of Fascist Germany again. The cohesion of the Judicial decisions presented, in the broader mosaic of the Common Law, forms a solid front for the Constitutional Question being presented. Indeed, what occurred here reflects a delay by the High Court in attending to this Constitutional Question, a delay too long . . . .

/S/JAMES L. GREEN

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

(CA 78-2544, orig
CA 77-8152)
(DC C77 0307 WWS
Northern Calif)

COMES NOW James L. Green, on his own behalf, and respectfully petitions this Honorable Court to issue a writ of certiorari to the 9th Circuit Court of Appeals to review that court's decision, regarding the petitioner's right to a trial by jury as provided in the 7th Amendment, and

the decision of the federal court below, and to ask this Honorable Court to review the Constitutional Question presented and to remand this matter for a trial by jury, as preserved in the 7th Amendment to the United States Constitution.

OPINIONS BELOW

ORDER from the 9th Circuit Court of Appeals, filed May 12, 1977, establishing petitioner's claim under the 14th Amendment to the "due process" right to a "speedy" hearing; the 9th Circuit specifying a cognizable damage "due to the *inexplicable* (emphasis added) delay of the Commission in reviewing his (petitioner's) claim." Order from the Ninth Circuit, filed on September 21, 1979. We believe these opinions once perfected, and denying the right to trial, and the events that followed constitute a gross miscarriage of justice, see *Goodkind v Wolkowsky,* 151 Fla. 62, So. 2d 553, 562, and the legal theory advanced in *Ex parte Young.* The 7th Amendment being unequivocal: a citizen need no more than ask for a trial, to expect that a trial will be granted.

JURISDICTION

This petition is filed seeking a direct cause of action under the 1st and 14th Amendments to the United States Constitution and to ask the Court to remand this matter for a jury trial as provided in the 7th Amendment to the United States Constitution. The jurisdiction of this Court is invoked under 28 U.S.C. §1651.

QUESTION PRESENTED

Are citizens deprived of their property without "due process" of law when they are denied a pretermination hearing, *particularly* where a grave medical problem militates against denial of the property right?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

First Amendment (a) "freedom of speech," (b) "the right of the people—to petition the government for a redress of grievances." (in a timely fashion).

Fourth Amendment (a) "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."

Seventh Amendment (a) "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Fourteenth Amendment (a) "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." (b) ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law." (c) ". . . nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On January 2, 1975, Petitioner James L. Green (hereinafter petitioner) was terminated from tenured government employment in retaliation for having written a memorandum regarding department morale. Petitioner was employed by respondent Alameda County Probation Department and, as well as having 14 years experience in the Criminal Justice System, petitioner had served as a Chief Probation Officer for over five years, and been rated as "exceeding the requirements" of his job with Alameda County—prior to writing the memorandum on department morale. The termination was effected by the Alameda County Probation Department, without "notice of the intended action," without access to the "materials" upon which the termination was based, without a copy of the "charges" upon which the termination was based, without the right to respond "orally or in writing to the authority initially imposing discipline" and without the right to "respond to the official who is to make the decision to terminate." *All of these provisions being established Constitutional Law on "due process."* Further, petitioner made repeated demands for a "speedy" post-termination hearing—the need for which was infinitely compounded by the fact that the petitioner's son was suffering from a chronic lung disease—Pulmonary Fibrosis—and required frequent hospitalizations and special medical equipment in the home. These facts were well known to the government officials involved.

Notwithstanding, the government officials delayed the start of the administrative hearing for over 3½ months, scheduled numerous and extensive delays in the administrative hearing, refused to provide space available for the hearing sessions, and purposely delayed resolution of the administrative hearing for almost three years—the longest in the history of the United States. On November 4, 1975, Petitioner filed a Writ of Mandate in the Superior Courts in Alameda County and in ruling adversely to the petitioner, on December 12, 1975, the court disregarded the Constitutional questions raised and variously held that the petitioner had delayed the administrative hearing by seeking relief in the courts to end the delays. A position that defiles the very meaning of judicial review. In spite of numerous and repeated demands for a resolution of the hearing process because of the injuries that were resulting by the delays, and including the above request for court intervention, all such efforts were to no avail. On January 22, 1976, the petitioner's son passed away. As noted, the resolution of the hearing lingered on for almost three years and in violation of the petitioner's Constitutional right under the 14th Amendment to the United States Constitution, to a "speedy" hearing. In light of numerous Constitutional violations which resulted in specific personal injuries, petitioner filed an action under section 1983 of the Civil Rights Act in Federal Court. The petitioner was met by a magistrate whose evaluation of the facts was neither neutral nor impartial and, because of his biased evaluation of the facts, he deemed it unnecessary to deal with the established Constitutional Law which was brought before the court for equitable resolution. And the request for a trial was denied out of hand and for spurious reasons, *thus preventing any cross-examination of the government witnesses in a court of law.*

REASONS FOR GRANTING THE WRIT

The legal safeguards to protect the petitioner's Constitutional rights in this matter are well established in the law. In 1968, the United States Supreme Court handed down the Pickering decision—*Pickering v The Board of Education,* 391 U.S. 563 (1968)—establishing the importance of First Amendment rights for "employees" and, as well, establishing a little understood point that the right to speak freely at work is critical to the preservation of our institutions (as a hedge against decay). And so that the institutions can change by evolution rather than by revolution (a primary reason for the First Amendment). The Pickering decision created an umbrella of decisions to follow which further reinforced First Amendment rights at work. *Muller v. Conlisk,* 429 F. 2d 901 (1970): *Downs v. Conway School District,* 328 F. Supp. 338 (1971); *Rafferty v. Philadelphia Psychiatric Center,* 356 F. Supp. 500 (1973); *Dendor v. Board of Fire and Police Commissioners* 297 N.E. 2d 316 (1973). Further, five U.S. Appellate Court decisions* in the past half-dozen years have held that the termination of an employee that is even *partially* in retaliation for the exercise of the Constitutional right of free speech is unlawful. Further, the United States Supreme Court, in 1972, established "property rights" in one's employment thus establishing that an employee cannot be terminated without "due process" of law as guaranteed under the 14th Amendment to the United States Constitution—*Perry v Sinderman,* 480 U.S. 593 (1972) and reaffirmed in *Bishop v Wood,* 426 U. S. 341 (1976). And in 1974, the United States Supreme Court gave specifics as to the process that was due in the termination of an employee before the property rights vested in employment could be taken away—*Arnett v*

* See Table of Authorities.

Kennedy, 416 U.S. 134 (1974). Again, the decision in *Arnett* created an umbrella of decisions including a decision by the California Supreme Court *Skelly v State Personnel Board,* 15 Cal App 3d 194 (1975), and a California Appellate Court case—*Kristal v State Personnel Board,* 50 Cal App 3d 230 (1975), among others. Specifically, these decisions, based upon the *Arnett* decision, defined the Constitutional Law on "due process" in this exact language:

SKELLY

. . . at least six justices on the high court agree that due process does mandate that the employee be accorded certain rights *before* (emphasis added) the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority imposing discipline.

KRISTAL

Extrapolation predicts six high court votes in favor of a rule that procedural due process requires that where a tenured government employee is to be discharged: (1) he be given notice of the charges against him or other cause for his discharge and an opportunity to respond to the official who is to make the decision to terminate, and (2) he be given a post-termination evidentiary hearing within a *reasonable time* (emphasis added) after his discharge with a right to reinstatement with back pay if his discharge is found to have been without a good cause.

Every legal point of the Constitutional Law was on petitioner's side and, in light of a compelling medical need, compliance with the law by the lower courts was infinitely magnified. Petitioner was *NOT* given "notice of the proposed action" pre-termination, nor the "reasons," nor the "materials" upon which the action was based, nor the right "to respond to the official who was to make the decision to terminate." Neither was petitioner "given a post-termination evidentiary hearing within a *reasonable* time . . ." Thus the petitioner *did not* receive a "speedy" hearing as guaranteed under the 14th Amendment to the United States Constitution.

Giving "notice" has been incorporated in the legal notion of "due process" since its inception, almost 200 years ago. "Notice" is required in the law so that the party whose property is being taken away has the opportunity to protect his legal interests. When the *government* is taking away a citizen's property interests, the whole issue of freedom from oppression enters the picture and the very foundations of the law, the United States Constitution, are focused upon the problem. From nursery school on, we educate our children in America to believe that we are a "free" country because the United States Constitution protects us from oppression from those appointed or elected to govern our daily activities. Both civil and criminal penalties have been established for government officials who violate a citizen's Constitutional rights. To guarantee that the citizen's Constitutional rights will not be violated by government officials, the courts *must* enforce the law—if this, as with any judicial system, is to remain a viable and trustworthy institution in society. Strict adherence to the law by the courts, then, in the only means by which we can hold out to the rest of the world that we are a "free" country.

Specifically, the United States Constitution holds that government officials in America cannot take away a man's "life, liberty, or property without due process of law." Central, in the law, to the process that is due to the citizen before his "life, liberty, or property" can be taken away is a "notice" from the government officials that they intend to deprive the citizen of these vested interests. Not only is a "notice" essential so that the citizen can take legal steps to protect these interests, but it is critical to planning when the deprivation of these vested interests can affect others who are dependent upon the citizen whose life or liberty or property is being deprived. In the present case, a "notice" of the intended action (termination) was critical to planning in the medical treatment of the petitioner's son.

Further, under the *applicable* law here, the "notice" must come from that person who, in fact, has the authority to take away the citizen's property. When applied to the facts of this case the only person with that authority in the Alameda County Probation Department was the Chief Probation Officer, James Callahan. The petitioner *never met* Callahan pre-termination. Further, the "notice" must actually be given. That didn't occur in this case. Indeed, the government officials took every conceivable human step to prevent the petitioner from knowing their intentions regarding termination. This is evident by the testimony of Yee, Callahan's Administrative Assistant and the Adult Division Director (see appendix). The *Arnett-Skelley-Kristal* trilogy of safeguards on "due process" provides that the *"preremoval safeguards must include* (emphasis added) notice of the proposed action" and "an opportunity to respond to the official who is to make the decision to terminate." A letter of termination was prepared for December 26, 1974, and

on December 24, 1974, Yee called the petitioner at his home to tell him of a meeting between Yee and another administrator which the petitioner was invited to attend on the morning of December 26, 1974. Prior to December 24, 1974, the petitioner had attempted on several occasions to learn from the administration what their intent was regarding either a transfer to another unit, some statement of intent one way or the other, or just what was the administration's position regarding the memorandum the petitioner had written, all such efforts being to no avail (see testimony in Appendix). In referring to the status of a pre-termination "notice" as late as December 24, 1974, less than 3 working hours before the termination was to, in fact, become final—Yee testified before the Civil Service Hearing as to this time-frame "*He's been waiting for an answer anyway, I know he's been waiting for some kind of response. —Mr. Green, had called me on several occasions before that date (December 24, 1974), wondering what was going to happen.*" In short, the petitioner's 14th amendment right to a "notice" that a property right was to be taken away—was *never* given—and the right to "due process" was violated. *The cognizable damage from this constitutional violation, as the Court can well see, runs much deeper than just a technical violation of the law.* Further, even as Yee was preparing the papers to finalize the termination, he was advising the petitioner and keeping open the promise that the transfer to another unit was being considered by the administration.

Finally, "notice of the proposed action" is a *key* phrase to the remainder of the law on "due process." Without a "notice" that states specifically that a certain event is going to happen, any other process that is due is rendered

useless. At no point in the lower court opinion, does the federal judge point to a document or even a statement that is designated as a "notice of the proposed action" because, as the lower court is fully aware, no such document exists. And without such a "notice," the terms "materials" or "charges" or the "right to respond orally or in writing" are meaningless terms because it is unclear what these requirements of the law are intended to be used for. At no point does the federal court judge, here, state that petitioner was *actually* given a "notice of the proposed action." The lower court only alludes to controverted testimony, denying out of hand, the petitioner's right to cross-examination on that testimony. Further, the position by the lower court that the petitioner "delayed" the administartive hearing by seeking relief in the courts to end the delays, is neither rational nor logical, and repugnant to decency in light of the known facts. The evidence before the federal court is overwhelming that the petitioner was terminated specifically in retaliation for his exercising of a right under the First Amendment to the United States Constitution, an act that is unlawful in the United States. And without a pretermination "notice," as prescribed in the law, it is obvious that the balance of the law on "due process" was not complied with here.

IN SUMMARY, the *QUESTION PRESENTED* to the High Court, then: Does the absence of a pretermination hearing constitute violation of "due process"? The High Court has addressed this problem before but has yet to incorporate this concept into the law. The specific language favoring a pretermination review, by the High Court, as used in *Skelly*, supra, and as distilled from *Arnett*, supra, is as follows:

". . . to determine whether a particular procedure permitting a taking of property *without a prior hearing* satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: (1) whether predeprivation safeguards minimize the risk of error in the initial taking decision, (2) whether the surrounding circumstances necessitate quick action, (3) *whether the post-deprivation hearing is sufficiently prompt,* (4) *whether the interim loss incurred by the person affected is substantial,* (5) and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful." *Mitchell v W.T. Grant Co.,* 416 U.S. 607–610; *Arnett v Kennedy,* 416 U.S. 167–171 (concurring opn., Justice Powell), 188–193 (concurring and dissenting opn., Justice White); see *Beaudreau v Superior Court,* 14 Cal 3d 448, 463–464.

In the light of the facts here, we believe that the question as to whether the petitioner's Constitutional right to "due process" was violated, when he was denied a pretermination hearing, that the answer is a resounding yes. Whether or not the High Court decides to change the Law to incorporate a pretermination hearing into the Law—with or without special conditions—does not alter the fact that the petitioner's Constitutional rights were violated, aside from the denial of a pretermination hearing, and substantial injury did result from the violation of those rights.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the lower court in this matter and the decision of the 9th Circuit Court of Appeals, and this case should be remanded for a trial by jury.

Respectfully submitted,

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(415) 793-0144

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Petition For A Writ of Certiorari To The Ninth Circuit Court of Appeals was sent by United States first class mail, postage prepaid, to counsel representing the parties to this proceeding and to Federal Judge Schwarzer this 12th day of December, 1979. Upon demand from the Clerk of the United States Supreme Court, this petition was printed and the printed copies have likewise been submitted to the respective parties. This petition was received and dated at the U.S. Supreme Court on December 14, 1979.

United States Court Of Appeals For The Ninth Circuit

JAMES GREEN,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 77-8152
VS.	)	
	)	ORDER
COUNTY OF ALAMEDA,	)	
DOUGLAS HICKLING,	)	D.C. #CV77-0307
COUNTY COUNSEL OF THE	)	WWS
COUNTY OF ALAMEDA, DOES	)	
I THROUGH LX,	)	NORTHERN
Defendants-Appellees.	)	CALIFORNIA

Before: HUFSTEDLER and GOODWIN, Circuit Judges

While the Court is sympathetic to appellant's plight *DUE TO THE INEXPLICABLE DELAY OF THE COMMISSION* in reviewing his claim, the Court, under the circumstances has neither the jurisdiction to review the district court's order as no notice of appeal has been filed nor the jurisdiction to compel any action on the part of the defendants-appellees. The emergency motion for injunction, for leave to proceed in forma pauperis and for appointment of counsel is denied.

Editorial Note: The 9th Circuit has acknowledged by its own statement "inexplicable delay" that the petitioner's Constitutional rights, i.e., *the law was violated.* Nevertheless, and in spite of immediate correction of the deficiencies herein, the Court has yet to provide equitable relief.

United States Court Of Appeals For The Ninth Circuit

JAMES GREEN,	)	
	)	
Plaintiff-Appellant,	)	
	)	D.C. #CV77-0307
VS.	)	WWS
	)	
COUNTY OF ALAMEDA,	)	NORTHERN
DOUGLAS HICKLING,	)	CALIFORNIA
COUNTY COUNSEL OF THE	)	
COUNTY OF ALAMEDA, DOES	)	
I THROUGH LX,	)	
Defendants-Appellees.	)	

Before: GOODWIN and HUG, Circuit Judges.

Upon due consideration, appellant's petition for rehearing is denied. The appeal was dismissed for a lack of prosecution and the petition offers no assurance that appellant could or would perfect his appeal if it were reinstated.

Editorial Note: To be perfected on appeal the matter must be remanded for cross-examination on controverted testimony. Though a trial by jury has been requested by the petitioner, the government defendants have yet to be cross-examined on a single fact—in any court of law. The lower courts will not act upon the known violations of the United States Constitution, such as the denial of a "speedy" hearing, nor upon clear evidence of Constitutional violations from the testimony of the Civil Service

Hearing—attached next, hereto. It is of *no* value to have Constitutional rights, nor indeed even a Constitution, if these rights are ignored or side-stepped by the judicial system established to enforce these rights. This petition, alone, suffices that this matter is *not* suffering from lack of prosecution, and that such a dismissal by the 9th Circuit is unwarranted.

Civil Service Hearing: July 28, 1975

HURT: You never left a message for Mr. Green that you had phoned on Christmas Eve, is that right?

YEE: I'm not saying that. I-I didn't give Notice to Mr. Green on Christmas Eve.

HURT: You tried to contact Mr. Green on Christmas Eve, didn't you?

YEE: It could be for other reasons.

HURT: What other reasons, Merry Christmas Green, come seen me on the 26th?

YEE: I remember that incident very specifically, with Mr. Reimer that we want to share (spare?) Mr. Green the knowledge that he was going to be terminated—we didn't want to do it on Christmas Eve. Ah, I knew something of a Christmas party being on that day too -no-no—

HURT: Now how would you respond when he said what do you want me to come in for?

YEE: *He's been waiting for an answer anyway, I know he's been waiting for some kind of response.* (EMPHASIS ADDED)

YEE: *—Mr. Green had called me on several occasions before that date, wondering what was going to happen—* (EMPHASIS ADDED)

(Italicized evidence is a violation of the "due process" clause of the 14th Amendment to the United States Constitution—*Arnett v Kennedy*).

Civil Service Hearing: June 25, 1975

HURT: Was it at your direction that all other staff was to be out of the building by 11:30 or noon that day?

JOHNSON: We asked people to take an early lunch hour, yessir.

HURT: And what was the purpose of that?

JOHNSON: To try to avoid an embarrassing situation.

HURT: To whom?

JOHNSON: To Mr. Green and the rest of the staff.

HURT: What was going to be so embarrassing?

JOHNSON: Because of the fact that Mr. Kadubec was instructed to go to his (Green's) office—this was on the instructions I believe of Mr. Reimer—that he would go to his office—and that we were to observe him while he cleaned out his desk of his personal effects.

HURT: And Kadubec was to arrest Green if he went near the Xerox, is that correct?

JOHNSON: Yes, that order was from Mr. Reimer, I believe.

HURT: *Prior to that time (January 2, 1975) had you made any attempt to give Green copies of all of these case reviews?*

JOHNSON: *No, sir.* (EMPHASIS ADDED)

HURT: So Mr. Kadubec sat in Mr. Green's office and you would drop in once in a while to watch how the sorting went of his personal effects—is that correct?

JOHNSON: Yes sir.

(Italicized evidence is a violation of the "due process" clause of the 14th Amendment to the United States Constitution—*Arnett v Kennedy.* These acts—including termination—were in retaliation for the petitioner having written a memorandum—a right under the First Amendment.)

TO THE JUSTICES OF
THE UNITED STATES SUPREME COURT:

In the past several years the courts have written a number of decisions strengthening the Constitutional rights of the citizen in the working place. These decisions have been made without evidence of region or limited to any specific locale. The decisions reflect a growing conciousness that every citizen has the right to be a productive member of his society, and that this right cannot be taken away by whim or by capricious action. There is, of course, sound reasoning in any free society for rejecting the notion that a citizen can be deprived of his income, by the government, for his political beliefs or actions—as specifically occurred here—lest we re-live the nightmare of Fascist Germany again. The cohesion of the Judicial decisions presented, in the broader mosaic of the Common Law, forms a solid front for the Constitutional Question being presented. Indeed, what occurred here reflects a delay by the High Court in attending to this Constitutional Question, a delay too long . . . .

/S/JAMES L. GREEN